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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FLOYD ROLAND WALKER III,

Defendant and Appellant.

E067404

(Super.Ct.No. INF1402616)

OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge.
Affirmed.

Renee Paradis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B.
Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Floyd Roland Walker III of inflicting

corporal injury upon a spouse/cohabitant. (Pen. Code¹, § 273.5, subd. (a).) The jury also found that he personally inflicted great bodily injury upon the victim, under circumstances involving domestic violence. (§ 12022.7, subd. (e).) Defendant filed a motion for new trial, which a trial court denied. Subsequently, the court held a bifurcated hearing and found true the allegations that defendant had served two prior prison terms (§ 667.5, subd. (b)), had one prior serious felony conviction (§ 667, subd. (a)), and had one prior strike conviction (§§ 667, subd. (c) & (e)(1), 1170.12, subd. (c)(1)). At the sentencing hearing, the court denied defendant's motion to dismiss the prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. It then sentenced him to the upper term of four years, doubled pursuant to the prior strike conviction, plus the low term of three years on the great bodily injury enhancement, a five-year prior serious felony conviction enhancement (§ 667, subd. (a)), and a one-year prior prison enhancement (§ 667.5, subd. (b)), for a total of 17 years in state prison.²

On appeal, defendant argues that he received ineffective assistance of counsel (IAC), when his counsel failed to object to the court's dual use of two sentencing factors in imposing the upper term. We disagree. However, we remand the matter for resentencing pursuant to Senate Bill No. 1393 (2017–2018 Reg. Sess.) (SB 1393). In all other respects, we affirm the judgment.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² The court ordered the second prior prison enhancement stricken.

FACTUAL BACKGROUND

R.L. (the victim) dated defendant for about two years, and they had a daughter together. On July 4, 2014, defendant, the victim, and their daughter, who was about 16 months old at the time, were staying at the Fantasy Springs casino and hotel. Throughout the day, defendant went back and forth between the hotel room and the casino, drinking and gambling. He returned to the hotel room the final time around 11:00 p.m., and he was drunk and angry. The victim was upset that she and their daughter (the baby) had been in the room all day, and that she and defendant did not take her to go see fireworks or anything together. Defendant started yelling and slapped the victim on the face at least twice. The victim went to lie down on the bed with the baby to try and diffuse the situation. However, defendant still yelled and called her names. He then hit her in the face. The baby woke up crying, and the victim tried to calm her down. Defendant grabbed her from the victim and would not give her back. He then stood up, held the baby on his left side, and started punching the victim with his right hand; he also kicked her. The victim was screaming and asking for the baby back. Defendant went into the bathroom, and the victim called the front desk. Eventually, two security guards knocked on her door.

The security guards observed that the victim had blood all over her face, and she was crying hysterically. She said, "He's beating me, get him, get my baby." They entered the room and saw defendant holding the baby, so they told him to put her down. The guards observed blood all over the room, including on the nightstand, telephone, side

of the bed, the wall, and the carpet. The guards called the police.

A police officer arrived and observed that the victim was crying and shaking. Both of her eyes were starting to swell and turn black and blue, she had a cut above her left eye, she had bruising and swelling on her nose, and she had a bruise on the left side of her cheekbone. The victim went to the hospital and the dentist to be examined. For several days, she could not move her jaw or talk very well.

ANALYSIS

I. Defendant Has Not Established IAC

Defendant argues that the court improperly imposed the upper term on his conviction, because it relied on two aggravating factors that were also used to enhance his sentence—his prior criminal history and the infliction of great bodily injury (GBI). He acknowledges that he did not raise this claim at trial and contends that his trial counsel’s failure to object to the dual use of facts deprived him of effective assistance of counsel. We conclude that the court properly imposed the upper term. Therefore, defendant cannot demonstrate that he suffered prejudice from his counsel’s failure to object, and his IAC claim fails.

A. Relevant Background

At the sentencing hearing, the court noted that it had read and considered the probation officer’s report, along with the People’s sentencing memorandum. Defense counsel argued there were mitigating factors here, including that there was “great provocation.” He pointed to the evidence that another hotel guest testified she heard a

woman screaming. Defense counsel argued that “[i]t appeared as if the male voice was more calm and reserved, whereas the female voice was louder and cursing.” The court then stated the following: “[T]here was no evidence presented that would support mitigation in this case. None. There’s nothing presented to me through sworn testimony. There was a lot of just [defendant] making arguments from his chair, which is not evidence. So there’s nothing to support the idea that there was anything mitigating in there going on and that because of the GBI, because of his history and his record, I find that the aggravating circumstances far outweigh any mitigation whatsoever and absolutely support a finding of upper term, especially given all of the prison sentences he’s had.” The court went on to impose the upper term on the conviction, doubled because of the prior strike, the low term of three years on the GBI enhancement, one year on the prison prior conviction, which was from March 21, 2001 (§ 667.5, subd. (b)), and five years on the prior serious felony conviction, which was from March 1, 2007 (§ 667, subd. (a)). The court struck the punishment on the second prison prior.

B. Defendant Has Failed to Establish IAC

To demonstrate ineffective assistance of counsel, a defendant must establish that his counsel’s performance was deficient under an objective standard of professional competency, and that there is a reasonable probability that but for counsel’s errors, a more favorable determination would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*)). If the defendant makes an insufficient showing on either one of these components, the claim fails. (*Ibid.*) “Moreover, ‘ “a court need not determine whether

counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” [Citation.]’ ” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Defendant contends there was no possible reason for his counsel's failure to object to the court's imposition of the upper term, which was allegedly based on impermissible aggravating factors. He claims the court mentioned only two aggravating factors to support the upper term—the GBI and his criminal history. He argues the GBI was precluded since the court also imposed a GBI enhancement. As to his criminal history, defendant contends that it is reasonably probable the court would not have chosen the upper term “if the impermissible dual-use facts (the domestic violence convictions) were set aside.”

“ ‘Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in “qualitative as well as quantitative terms” [citation] We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.’ [Citations.]” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) Aggravating circumstances a court can consider include the factors that “[t]he defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous *or* of increasing seriousness,” and that “[t]he defendant has served a prior term in prison or county jail under section 1170(h).” (Cal. Rules of Court, rule 4.421(b)(2) & (3).) “[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any

provision of law.” (§ 1170, subd. (b).)

Contrary to defendant’s claim, the court stated several reasons for imposing the upper term, including “the GBI, [defendant’s] history and his record [and] all of the prison sentences he’s had.” The People concede that the court should not have relied upon the GBI and the two felony convictions that were the bases of the prior prison conviction and prior serious felony conviction enhancements to impose the upper term. We agree that the court was not permitted to use “the fact” of the GBI enhancement to impose the upper term. (§ 1170, subd. (b).) However, it is clear from the statement of reasons set forth above that the court did not use “the fact” of defendant’s prior conviction enhancements as aggravating circumstances. Rather, the court noted his “history and his record.” Thus, the court did not improperly rely on a dual use of facts, with regard to the section 667.5, subdivision (b) and 667, subdivision (a) enhancements, as defendant claims.

In any case, “a court needs only one factor to impose the aggravated term.” (*People v. Kelley* (1997) 52 Cal.App.4th 568, 581.) In citing defendant’s history, record, and numerous prison sentences, the court apparently relied on the aggravating factors that defendant’s prior convictions were numerous and that he served multiple terms in prison or county jail. (Cal. Rules of Court, rule 4.421(b)(2) & (3).) His criminal history dates back to 1998 and includes 11 infractions, 10 misdemeanors, and four felony convictions. The felony convictions were for assault with a deadly weapon (§ 245, subd. (a)(1)) and inflicting corporal injury on a spouse (§ 273.5, subd. (a)). The record shows that

defendant has spent numerous days in jail and several years on probation for his misdemeanor convictions. He has also been sentenced to at least three prison terms. We further note that the court heard and considered defense counsel's argument regarding mitigating circumstances, namely that there was "great provocation." However, it found no mitigating factors.

In view of the record, we conclude the court properly imposed the upper term. As such, defendant cannot show that he suffered prejudice as a result of his counsel's failure to object to the alleged dual use of facts. Thus, his IAC claim fails.

II. The Matter is Remanded for Resentencing

On September 30, 2018, the Governor signed SB 1393 which, effective January 1, 2019, amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) After our original opinion in this case was filed on October 26, 2018, defendant petitioned for rehearing claiming that, in light of SB 1393, the matter should be remanded for resentencing, so the trial court may exercise its discretion to dismiss or strike the five-year consecutive term that was imposed based on his prior serious felony conviction. (§ 667, subd. (a).) We granted defendant's petition for rehearing. We have modified our original opinion to add this part and to remand the matter for resentencing.

Defendant claims SB 1393 applies retroactively to all cases or judgments of

conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction was not final when SB 1393 became effective on January 1, 2019. The People filed a supplemental brief and conceded that the matter should be remanded for sentencing. We agree. (*Garcia, supra*, 28 Cal.App.5th at pp. 971-973.)

DISPOSITION

The matter is remanded to the trial court with directions to resentence defendant, pursuant to sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill 1393. In all other respects, the judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.